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In The

Supreme Court of the United States

October Term, 1983

UNION PROCESSING CORPORATION,

Petitioner,

vs.

MORRIS ATKIN, SOL ATKIN, and SAMUEL J. ATKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

HARRIS, BEACH, WILCOX, RUBIN and LEVEY
Attorneys for Respondents
Office and P.O. Address
Two State Street
Rochester, New York 14614
(716) 232-4440

James M. Hartman
Paul J. Yesawich, III
Of Counsel

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QUESTION PRESENTED

Whether an agreement precluding a competitor from locating certain equipment within a small portion of a large geographic market constitutes a *per se* violation of Section 1 of the Sherman Act, on the ground that it is an impermissible division of territories.

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COUNTERSTATEMENT OF THE CASE

In this action, the respondents seek to recover certain commissions which are due as a result of the petitioner's admitted breach of contract. The petitioner ("Union") has refused to pay plaintiffs two percent (2%) of its gross sales of shredded scrap metal, although it agreed to do so in writing. When the respondents sued to enforce the agreement, Union argued that the contract was an illegal restraint of trade and, thus, unenforceable. The non-jury trial below was limited to the question of the legality of the agreement, and the New York Supreme Court, Trial Term, found that the agreement violated both the Sherman and Donnelly Acts and was therefore void. The Appellate Division of the New York Supreme Court, disagreeing, reversed the judgment and declared the contract valid. The New York Court of Appeals affirmed, finding no legitimate antitrust issue.

Many of the central facts are undisputed. In May, 1974, the respondents agreed to purchase a Newell shredder (a device that would reduce automobile hulks and the like to small steel fragments) with the intention of entering the shredded scrap business. For thirty years prior to that time the respondents had purchased scrap metal, processed that raw material, and sold it to steel mills. These raw materials had been processed in a baler, which compressed them and segregated the non-ferrous elements of the product prior to sale. The shredder that the respondents contemplated purchasing differed from the baler in that the finished product was smaller. Both Union and the respondents believed that the product produced by the shredder would, in the future, be more desirable to steel mills than the product produced by balers.

In September, 1974, Sanford Aroneck, Alan Aroneck and Aaron Aroneck, who own Union, contracted to buy a Hammermill shredder so that they too could enter the shredded scrap business in the Rochester area. The Aronecks learned of the respondents' plan to enter the business sometime after they ordered their shredder. The Aronecks then contacted the respondents to discuss their mutual business interests. Both the Atkins and the Aronecks agreed that the Rochester area could not support two shredders and that if both went into the business, neither could survive. Both parties agreed, however, that one shredder could operate profitably, and the respondents suggested that the Aronecks join them in a partnership; however the Aronecks rejected this suggestion out of hand. The Aronecks desired to have the shredder business to themselves and offered to take an assignment of the Atkins' contract to purchase the Newell shredder. The respondents had already made a downpayment of $64,915.00 toward the purchase price of that shredder; the total cost of which was approximately $650,000.00. In contrast, the Hammermill shredder, which Union had contracted to purchase, was to cost approximately $1,000,000.00.

Thereafter there were several meetings between the parties where the potential shredding operation was discussed. As a consequence of these meetings, and the negotiations that ensued, an agreement was reached whereby Union would accept an assignment of the respondents' contract to purchase the Newell shredder, reimburse the Atkins for their downpayment and pay them 2% of Union's gross revenues from the shredding business for the ensuing seven years. The Atkins, however, rejected Union's proposal that a provision be inserted in the contract requiring that the respondents "not . . . compete [with Union] in the Rochester area in the area of shredded scrap."

The parties ultimately memorialized their agreement but the written contract did not contain a covenant by the Atkins not to compete with Union in the sale of shredded scrap. Pursuant to the agreement, Union paid the Atkins 2% of its gross revenues for approximately a year and a half. At that time, however, a dispute unrelated to this litigation arose between the parties, and Union breached the contract, refusing to make the required payments. When the respondents eventually sued to enforce the contract, Union argued that, notwithstanding the plain language of the contract, there was an oral arrangement between the parties, whereby the Atkins agreed not to compete with Union in the shredded scrap business in the Rochester area. According to the petitioners, this arrangement was anticompetitive and voided the contract.

The Atkins denied that any such oral contract existed, but the trial court found to the contrary. The trial judge went on to hold that the oral agreement was "*per se* harmful to the interests of the public at large," and violated the Sherman and Donnelly Acts. On appeal, the Appellate Division found, as a matter of law, that there was no division of territories, and thus no *per se* violation of the antitrust laws. The Appellate Division's conclusion was based upon undisputed testimony that the shredded scrap (the end product produced by the shredder and sold to steel mills) market extended as far east as

Albany, N.Y. and as far west as St. Louis, and included parts of Canada. Even if an agreement not to place a shredder in "the Rochester area" existed, held the court, there was no allocation of markets because the "Rochester area" was not a market and nothing prevented the Atkins from operating a shredder at another location in New York State (or elsewhere) and effectively competing with Union in this broad geographic market. Moreover, there was no allocation of the raw materials market (*i.e.*, the scrap purchased by Union and the Atkins for shredding and resale) because it was undisputed that that market included most of New York State and parts of Pennsylvania. It was also undisputed that even after the agreement was signed the Atkins continued to compete with Union (and others) for these raw materials.

The Appellate Division, employing a Rule of Reason analysis, also held that the "defendant . . . made no showing that competition was effectively restricted by this agreement to the detriment of the public interest."

The New York Court of Appeals affirmed on the opinion of the Appellate Division, adding that "there is no evidentiary support in the record for any finding that the scrap metals/raw materials market (as distinguished from the shredded scrap/products market) was limited to the Rochester area to which the agreement of the parties related."

The petitioner has argued that the Atkins/Union agreement was a horizontal arrangement among competitors that purposely restrained competition in both the shredded scrap market and the raw materials market. According to Union, this contract effected an allocation of both markets to one competitor in exchange for a division of the resulting gross revenues, and was thus a *per se* violation of the Sherman Act. The courts below found (and Union does not deny) that the petitioner made no attempt at trial to show that there was in fact any public injury, or lessening of competition, resulting

from this arrangement. Union thus sinks or swims on whether the agreement between the parties constituted a *per se* violation of the Sherman Act. However, the alleged oral contract did not constitute a prohibited division of markets because it involved the allocation of only a small portion of the relevant geographic market. Petitioner now asks this Court to create a new denomination of *per se* violation to allow it to escape the payment provisions of its contract.

REASONS FOR DENYING THE WRIT

POINT I

Because this Court has already defined the scope of the *per se* rule forbidding market allocations, no important federal question is raised by this appeal.

This Court has long held that one of the classic *per se* violations of Section 1 of the Sherman Act occurs when competitors at the same level of the market structure agree to allocate territories in order to minimize competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). This Court has also held that "threatened foreclosure of competition must be in relation to the market affected." *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 327 (1961). In order to prove a horizontal division of markets "the competition foreclosed by the contract must be shown to constitute a substantial share of the relevant market." *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 328 (1961).

Throughout the litigation, petitioner has claimed that the alleged contract not to compete in the "Rochester area" constituted an impermissible allocation of markets. However, the courts below found that the relevant raw materials and end product markets encompass several states, and are not limited to "the Rochester area." Because respondents were free

to locate a shredder in close proximity to Rochester, or anywhere else in this broad geographic market, the contract did not prohibit respondents from competing effectively in the relevant market.

Now, however, Union asks this Court to change its long-standing rule that a *per se* violation must involve a "substantial share" of the entire relevant market. Contrary to Union's representations, this Court has passed on the question of whether the allocation of a small portion of the relevant market constitutes a *per se* violation of the Sherman Act. In *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 327-8 (1961), this Court refused to hold that there was a division of markets where a contract foreclosed competition in "peninsular Florida," when the relevant geographic market was at least seven states in size, and the restraint involved only a small portion of this broader geographic area. 365 U.S. at 331-33. Similarly, in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), exclusive dealings between United States Steel and Consolidated Steel Corporation for rolled steel did not constitute a division of markets where Consolidated possessed only a small share of the relevant market and there was no injury to competition. This Court has made it clear that when applying the *per se* rule to a claimed division of markets, the restraint must affect the entire market, not some isolated portion of it.

Union is really asking this Court to change the law because it is dissatisfied with the lower courts' findings of fact. The New York appellate courts, using their power to review questions of fact (*N.Y. C.P.L.R.* §5501), found that the relevant geographic market was not the "Rochester area," but rather "an area encompassing several States." Faced with this determination, the petitioner cannot prove an illegal restraint in the relevant market, and must resort to asking this Court to change well entrenched, and sound, precedent.

If this Court is inclined to overrule decisions such as *United States v. Topco Associates*, 405 U.S. 596 (1972), and *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320 (1961), and expand the *per se* doctrine, a dangerous precedent would be set. Nearly every contract, then, could be viewed as restraining trade in a portion of some market, be it a small geographic area or a lilliputian share of a product market. The Sherman Act was intended to prevent restraint of trade in the market place — not between two individuals whose activities will have a *de minimus* effect on potential competitors and consumers. In such cases, the Rule of Reason is adequate protection, and courts can determine on a case by case basis whether a particular contract restrains competition and is illegal. In short, it is difficult to see how petitioner's arguments pose a novel and pressing federal question.

POINT II

There is no conflict between New York and other jurisdictions in this case.

Petitioner also claims that there is a conflict between New York law on this subject and that of other jurisdictions. The "conflict" is imaginary and arises from Union's misinterpretation of a 1906 decision of the Louisiana Supreme Court.

In *Webb Press v. Bierce*, 116 La. 905, 41 So. 203 (1906), the Supreme Court of Louisiana held that an agreement by one party to abandon his plans to enter into a business was illegal under an Oklahoma statute. The statute that was the rudiment of the decision was later described by the Supreme Court of Oklahoma as "arbitrary" and "reflecting medieval economic ideals." *Wesley v. Chandler*, 152 Okla. 33, 3 P.2d 720, 722 (1931). "Medieval" economic ideals are hardly relevant to an analysis of the policies advanced by the Sherman Act.

Petitioner also relies on *Gross, Kelly & Co. v. Bibo*, 19 N.M. 495, 145 P. 480 (1914), where the Supreme Court of New Mexico (relying upon *Webb Press, supra*) held that a contract not to engage in business at an isolated western town (Grants, N.M.), near the turn of the century, was invalid. Even if this case did not involve the allocation of the entire market, it is hardly relevant.

Gross and *Webb Press* represent the thinking of courts at a time when state common and statutory law was more strictly construed to forbid restraints on competition. They have no bearing upon this Court's interpretation of the Sherman Act over the next 70 years. These cases represent a restrictive, even draconian, approach to trade regulation. As the New York Court of Appeals has held:

> At one time in the early history of the common law, such promises were routinely held to be unenforceable, since they were deemed to be violative of the strong public policy in favor of encouraging free trade and discouraging monopolies (*see Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211; 14 Williston, Contracts [3d ed], §§1635-1636). Later, however, the inflexible approach of the judiciary to such agreements was relaxed to some extent as the courts came to realize that a blanket prohibition against agreements purporting to restrain trade was contrary to the equally strong public policy in favor of allowing individuals to dispose of their property freely and to enter into binding contracts. Ultimately, agreements restricting the parties' right to compete were recognized by the courts and were held fully enforceable if the restrictions were found to be "reasonable" in geographic scope and duration.

Mohawk Maintenance Co. v. Kessler, 52 N.Y.2d 276, 283-4, 437 N.Y.S.2d 646, 650 (1980) [some cites omitted].

The superannuated view of cases such as *Webb Press* and *Gross* has become extinct. These cases relate only to the interpretation by each state of law or statutes peculiar to that forum, and not to the interpretation of the Sherman Act.

POINT III

There is no reason to consider whether a new *per se* rule should be developed for this case.

In Point III of its brief, Union invites this Court to wrestle with a confusing argument, *viz.* whether or not under a Rule of Reason analysis a restraint is reasonable where it involves one competitor paying another not to locate in a portion of the geographic market. In the first place, the argument is puzzling because petitioner never offered any proof at trial about the economic impact of the alleged oral agreement by the Atkins not to locate a shredder in Rochester. Thus, no matter what the nature of the restraint, Union could not prevail on a Rule of Reason theory because it did not prove public injury. Because it also cannot prove a *per se* violation, it has no legitimate anti-trust claim.

This argument is a variation on the same theme and is simply another way of asking this Court to create a new category of *per se* violation. In fact, after analyzing this argument we now know what Mark Twain meant when he said: "The more you explain it, the more I don't understand it."

While petitioner claims that the decision below raises significant concerns about the type of excuse which can justify an anti-competitive arrangement, Union did not come forward with any evidence at trial to show that this arrangement did unreasonably restrain trade. If it had, Union might have prevailed on a Rule of Reason theory. The fact is that there was no proof that the agreement restrained trade or injured the public in any fashion, and this issue is hardly one that merits review by this Court.

CONCLUSION

For these reasons, the writ of certiorari requested by petitioner should not be issued.

Respectfully submitted,

James M. Hartman
Paul J. Yesawich, III

HARRIS, BEACH, WILCOX,
RUBIN and LEVEY
Attorneys for Respondents
Office and P.O. Address
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440

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